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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 78-76

JOHN Q. ELLIOTT, M.D. ..... *Petitioner*

v.

ARKANSAS STATE MEDICAL BOARD ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Arkansas (App. to Petition) is reported in 563 S.W.2nd 427.

JURISDICTION

The jurisdictional features are set forth in the Petition.

QUESTIONS PRESENTED

The Petitioner presents five asserted questions for review which will be repeated in the later argument in this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set forth in the Petition.

ARGUMENT

In the interest of brevity and orderliness we shall reproduce the "Questions Presented" by Petitioner in the sequence in which they appear in the Petition and respond to them individually.

First question presented:

1. Whether a doctor of medicine at an administrative hearing involving the question of suspension of said physician's license is denied due process of law if not informed of the nature and cause of the accusations; if not confronted with the witnesses against him; if not given the assistance of counsel for his defense or advised of his right to counsel.

The proceeding involving Petitioner is governed by the following provisions of the Arkansas Medical Practices Act and the Arkansas Administrative Procedure Act.

Arkansas Statutes 72-613 states: "The Board may revoke an existing license or suspend an existing license in the event the holder thereof or the applicant therefor; as the case may be, has committed any of the acts or offenses herein defined to be unprofessional conduct. The words 'unprofessional conduct' as used in this Act are declared to mean:

(g) "grossly negligent or ignorant malpractice."

Regulation Two (2) of the Regulations of the Arkansas State Medical Board reads:

"The Arkansas Medical Practices Act authorizes the Arkansas State Medical Board to revoke or suspend the license issued by the

Board to practice medicine if the holder thereof has been found guilty of grossly negligent or ignorant malpractice. 'Malpractice' includes any professional misconduct, unreasonable lack of skill or fidelity in professional duties, evil practice, or illegal or immoral conduct in the practice of medicine and surgery.

It shall include, among other things, but not limited to;

(4) The prescribing of excessive amounts of controlled substances to a patient including the writing of an excessive number of prescriptions for an addicting or potentially harmful drug to the patient."

The Administrative Procedure Act (Arkansas Statutes 5-708 et seq.) governs procedure of the Medical Board. It provides for notice in administrative adjudication as follows:

5-708. In every case of adjudication:

(a) All parties shall be afforded an opportunity for hearing after reasonable notice.

(b) the notice shall include:

(1) A statement of the time, place and nature of the hearing.

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A short plain statement of the matters of fact and law asserted.

(c) Opportunity shall be afforded all parties to

respond and present evidence and argument on all issues involved.

The Order to Appear and Show Cause which was served upon Petitioner on October 26, 1976 reads, in part:

> The Arkansas State Medical Board has received evidence that you have been guilty of acts which will justify the revocation of your license to practice medicine in the State of Arkansas.
>
> Specifically, it has been charged that you have violated the provisions of Ark. Stat. 72-613(e)(g) in that you have written prescriptions for Schedule II drugs excessively and you have written an excessive number of prescriptions for Schedule II drugs for some persons as reflected by the attached investigative report.
>
> You have been guilty of grossly negligent malpractice in the prescribing and dispensing of said drugs.

Attached to the Order to Appear and Show Cause was a report from the Investigator to the attorney for the Board together with a copy of the investigative check sheet. (R. 10-19). Statement by the investigator in the report and on the check sheet are:

> "I simply see no need of continuing to name all of the patients for whom Dr. Elliott prescribed Schedule II drugs over this investigation period. I feel that the enclosed worksheets are self-explanatory and that Dr. Elliott has not lived up to his agreement with the Medical Board in curtailing his prescribing of these drugs.
>
> I found that several pharmacists in the area would refuse to fill Dr. Elliott's prescriptions. Many of them said that, in their opinion, the people simply had no need for such drugs.
>
> I, also, found some information with the police department in Blytheville that Dr. Elliott had contributed to the illicit drug traffic through his prescriptions.
>
> I think that the Medical Board might want to call an investigator with the State Health Department, who, also, has a substantial amount of evidence pertaining to the prescribing habits of Dr. Elliott, as well as evidence to back up that Dr. Elliott had prescribed Schedule II drugs for the same person under more than one name on the same date.
>
> It seems to me that the enclosed evidence is sufficient for the Medical Board to re-evaluate Dr. Elliott's prescription habits."
>
> "Remarks: Mr. Warren, the above Rx's were all picked up from one Phcy. except the one for Dilaudid — filled in Osceola. Several R.Ph's in area will not fill Rx's written by this M.D. Several people have gotten Rx's from him using 3 or 4 different names, etc. The enclosed Rx's pertain only to this one work sheet. I have several more in that area. And also State Health have some."

It is clear that the Order to Appear and Show Cause with the attachments thereto informed the Petitioner of the charges which had been made against him. He was informed that the investigator had asserted that he was writing prescriptions for Schedule II drugs excessively and that although he had agreed with the Board not to write any more prescriptions for amphetamine drugs he had done so;

that he was writing prescriptions for hard narcotics for persons and that Petitioner was contributing to the illicit drug traffic in his area of the practice. Little's letter also stated that another agency had information on Petitioner's bad "prescribing habits", to wit: The Board of Health. Little's comments on his work sheet attached to the Order to Appear and Show Cause were sufficient to place any person on notice that he should do more than wait until December 9th and hope to talk the Board out of taking action as he had done in 1974 when he was charged with improper prescribing of amphetamine drugs (speed as it is called on the street). Petitioner's failure to employ a lawyer or seek professional advice was not because of ignorance or mental inability, nor of financial inability. (When the Board acted to temporarily suspend his license he moved with alacrity to obtain the excellent attorney he has now.) The magnitude of his prescriptions belie any assumption of a financial inability.

Instead of relying on his ability to persuade the Board to do no more than admonish him not to write prescriptions for Quaalude the Petitioner should have employed an attorney who could and would have availed himself of the discovery procedures secured by Arkansas Statutes 5-709 to administrative hearings.

The second part of this Question Presented is "if not confronted with the witnesses against him." This statement is simply not confirmed by the record which clearly reveals that Petitioner was present during the testimony of Inspector Little and Inspector Probasco. Indeed, several times he interrupted their testimony with explanations and statements of avoidance. The Order of the Board shows that it was issued on the basis of the evidence of these two witnesses given in the hearing in the presence of Petitioner.

The third part of the Question Presented states "if not given the assistance of counsel for his defense or advised of his right to counsel." Petitioner's failure to appear with counsel can be blamed only on Petitioner. He was not denied counsel. The Administrative Procedure Act *Ark. Stat. Ann.* §5-709(a) secured to him the right to be represented by counsel. Petitioner did not choose to employ an attorney. There is nothing in the record to indicate that he was financially unable to do so, or that he was incompetent or mentally disadvantaged. As an active practicing physician it must be assumed that he was not a disadvantaged person.

Nor was the Board required by either statute or the Constitution to furnish Petitioner counsel. *Ferguson v. Gathright*, C.A. 4, 485 F.2nd 504, *Cert. denied* 415 U.S. 933, 39 L. Ed. 2nd 491, 94 S. Ct. 1447.

Nor was the Board required to advise him of his right to counsel. The Miranda Warning does not apply to civil and administrative hearings. *Beckwith v. U. S.*, 425 U.S. 341, 48 L. Ed. 2nd 1, 96 S. Ct. 1612.

Second Question Presented:

2. Whether a stated determination by a voting member of the administrative hearing board, prior to the close of evidence states his opinion of guilt and recommendation of suspension is a violation of the equal protection of the law and due process of law provisions of the Constitution of the United States.

It is true that one member of the Board, Dr. Joe Verser, *after hearing the testimony* did express an opinion that the Board was going to have to take action to take Petitioner out from the influence of people who were taking advantage

of him. It is unfortunately true that when a physician (usually an elderly, part-time practitioner) demonstrates that he can't say no to the drug cult they descend on him in droves. The only successful way to protect him is for the appropriate authority to make it impossible for him to furnish drugs or prescriptions to the abusers. If the physician can't write a valid prescription there is no point in forcing him to write a prescription or injuring him for refusal to do so. People who abuse drugs get "hooked" on them and when deprived of the drugs won't or can't take no for an answer. They then use any means to get the drugs and become a menace to society. The physician whose carelessness helps create the addict can't safely refuse him further drugs.

Addiction frequently comes from "playing around" with drugs with no intention of becoming addicted.

As a member of the Board Dr. Verser was well within the rights of a trier of facts in expressing his opinion as he did.

Third Question Presented:

3. Whether a notice of a hearing specifically charging that prescriptions for Schedule II drugs excessively and excessive number of prescriptions for Schedule II drugs and a further allegation of "guilty of grossly negligent malpractice" in prescribing and dispensing said drugs without any particularization of misconduct or allegation of misconduct with particular certainty is violative of the due process of law and equal protection clause?

We have responded to this contention in our response to the First Question.

Fourth Question Presented:

4. Whether or not unfounded hearsay and testimony replete with conclusions, conjecture, speculation and guesswork not objected to at the administrative hearing (without counsel) but timely raised on appeal to the Supreme Court of Arkansas are a denial of due process of law and equal protection of the law as to this petitioner?

Petitioner asserts that the reception of hearsay evidence by the Board deprived him of due process. The Arkansas Administrative Procedure Act, *Ark. Stat. Ann.* §5-709 provides:

"Irrelevant, immaterial and unduly repetitious evidence shall be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

Hearsay evidence received in administrative proceedings violates no principle of due process. See *Richardson v. Perales*, 402 U.S. 389, 28 L. Ed. 2nd 842, 91 S. Ct. 1420; *Con. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 83 L. Ed. 128, 59 S. Ct. 206; *Spiller v. Atchinson T. & S.F. R. Co.*, 253 U.S. 117, 64 L. Ed. 810, 40 S. Ct. 466.

Fifth Question Presented:

5. Whether an administrative hearing held or conducted in such a way as to curtail or limit explanation or denial of an opportunity to be heard is a denial of the due process and the equal protection of the laws as to this petitioner?

Petitioner is handicapped by the Record in his position taken in the Question.

Dr. Elliott stated: (R. 29) "People who have tried it they tell me that mixed with alcohol this is what they like about Quaalude. It heightens their sexual performance."

Surely Dr. Elliott knew the extreme danger of mixing alcohol with depressant drugs. The news media daily reports of deaths caused by this admixture. But Dr. Elliott also knew of a more dangerous use for Quaalude, one used only by the most hardened of drug abusers. He stated: (R. 30) "They would melt them down and inject them and then take them a drink or two and they were way up out in the blue yonder. Now some of these prescriptions were for kids I have known. Some of them married, some of them twenty, twenty-two or four or five years old."

Investigator Probasco testified that a black male was arrested at Osceola for theft; that when the police conducted a search of his person they found two different bottles of Quaalude in his possession from prescriptions written by Dr. Elliott, one for a Michael Johnson, the other for a Will Jones; that Quaalude was bringing three to four dollars a tablet on the street; that there were too many people getting to Dr. Elliott in the traffic on the street. (R. 31)

Dr. Elliott explains this in these words: (R. 31-32) "They have got me wrong on the Negro. The first one who came in there was about seventy and looked like he had been awake two or three days. He was about five foot nine or ten inches and weighed about one hundred thirty-seven. A day or two later a Negro came in just about my height and gave his name as Will Jones, the same address, age was seventy and a day or two later he comes in there dressed up like one of those Jigaboos like on the Kojak show. That night he was that much bigger than me. I looked at him

in the face and said, 'weren't you in here a day or two ago' and he said, 'no, that was my brother.' I looked down and them shoes were built up like that. So that night Osceola called me they had picked up or stopped him on a traffic deal and he had a match box full of different kinds and I said, 'hold on to him.' I called the City and told them to check on him. They got to checking him and run a rap sheet and he was wanted in Los Angeles and somewhere, I believe it was Reno." This is an interesting description of how drug pushers work but it fails utterly to absolve Dr. Elliott from giving prescriptions to one person in two different names at the same address and for no explained medical purposes.

CONCLUSION

Petitioner was given an opportunity to explain his massive writing of prescriptions for the drug Quaalude. His statements to the Board reflected that most of the prescriptions were for young people who he knew; that he had been told that use of Quaalude with alcohol heightened sexual performance; that he had learned that they were converting the drug into an injectable substance and following up on the injection with alcohol; that when he discovered persons had been arrested with two containers of these drugs obtained on prescriptions written by Petitioner for two different persons he advised the police who had apprehended the culprit to "hold on to him." Surely all this is not the act of an ignorant, innocent country doctor trying to aid mankind.

The Petition should be denied.

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